Petition

81-1473

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. A-609

ALBERT R. KLINSKI

Petitioner,

v.

FOUR WINDS TRAVEL, INC.

Respondent.

Petition For A Writ of Certiorari

To The Supreme Court of Illinois

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. A-609

ALBERT R. KLINSKI

Petitioner,

v.

FOUR WINDS TRAVEL, INC.

Respondent.

Petition For A Writ of Certiorari

To The Supreme Court of Illinois

Petitioner, ALBERT R. KLINSKI, prays that a Writ of Certiorari issue to review the order of the Supreme Court of Illinois, entered September 16, 1981, denying his motion to file a petition for appeal as a matter of right, or, in the alternative, for leave to appeal.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of the Appellate Court of Illinois to have furnished petitioner with actual notice, before or after the fact, of the dismissal of his appeal for want of prosecution is a violation of his right to due process of law under the Fourteenth Amendment of the Constituion of the United States.

2. Whether the failure of the Appellate Court of Illinois to have furnished petitioner with actual notice of the dismissal of his cause for want of prosecution, at a time when petitioner was not represented by counsel, is a violation of petitioner's right to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in view of the fact that such notice is often provided to parties represented by counsel.

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Illinois Revised Statutes, (1979) Ch. 110, Sec. 50.1

Jayson et al (eds): The Constitution of the United States of America: Analysis and Interpretation (1972)

Merrill on Notice (1952), Sec. 1119

OPINIONS BELOW

No opinion was issued by the Supreme Court of Illinois in support of its order denying petitioner's motion.

JURISDICTION

The order of the Supreme Court of Illinois denying petitioner's motion was entered on September 16, 1981. This was a final and dispositive order. An order extending the time for filing a petition for a writ of certiorari to and including January 29, 1982 was entered by Justice Stevens on January 7, 1982. Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the Constitution of the United States

Section 1

All persons born or naturalized in the United States and subject ot the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Counsel who practice in the Appellate Court of Illinois, First District, often receive courtesies from the Court personnel. If, for example, the justices are contemplating the dismissal of a cause for want of prosecution, it is usual for a clerk or administrative attorney to contact the appellant's counsel, either in writing or by telephone. Thus warned, counsel can take appropriate steps to protect his appeal. Should the Court enter an order dismissing for want of prosecution, there is a likelihood that counsel would be similarly notified. The order would also be published in the Chicago Daily Law Bulletin.

Two aspects of the Court's procedure should be noted: 1) It is discretionary, and therefore not governed by a statute, rule, or general order; and 2) the courtesy

of personal contact is less likely to be extended to a party not represented by counsel. The Chief Clerk of the Court explains this on the basis of the lesser probability that the Court would have a pro se litigant's address or telephone number. It cannot be said, however, that such litigants would be contacted whenever the Court had this information.

Petitioner in the instant case filed his notice of appeal, by counsel, in the Appellate Court of Illinois, First District on April 10, 1980. He subsequently differed with his attorney and the attorney moved to withdraw. The court granted the motion on June 23, 1980. Petitioner thereupon set out to find new counsel. In the light of his previous experiences, he wished to exercise great care in his search. Both his caution and the reluctance of five

lawyers he spoke with to handle his case led to a gap of seven months in which he had no legal representation. He retained his present counsel in January, 1981. When said counsel moved to appear on behalf of petitioner and to obtain a new briefing schedule from the court, he discovered, for the first time, that the court had dismissed the cause for want of prosecution, of its own motion, on November 19, 1980, while petitioner was without counsel. Petitioner had no notice of the pendency or entry of this order, and none had apparently been sent to him, although the case file contained an address at which he could have been reached. Even if petitioner had taken the initiative, however, and inquired of the court how much of a "grace period" he had after the date for filing his brief, his inquiry would have been of no avail. It is

recalled that the court operates without statute, rule or general order in dismissing cases for want of prosecution. Absent clear principles to guide it, the Court or its clerk cannot properly advise a litigant as to its future actions.

Petitioner's new counsel filed several motions in the Appellate Court asking, in effect, that the dismissal order be vacated and the appeal reinstated. Counsel's efforts are described in the motion for Leave to File a Petition as of Right, as set forth in the Appendix hereto. Counsel alleged violation of petitioner's right to due process and equal protection of the laws, under the 14th Amendment of the Constitution of the United States, on the basis of his failure to have notice of the pendency or entry of the dismissal order.

On the basis of these constitutional infringments, petitioner sought leave, on September 10, 1980, to file a petition in the Supreme Court of Illinois. Said leave was denied on September 14, 1980. The constitutional issues raised below are now presented to this Court for review.

REASONS FOR GRANTING THE WRIT

A. The Due Process Claim

The due process clause of the 14th Amendment of the United States guarantees that the deprivation of life, liberty, or property will be preceded by notice and the opportunity to be heard. The prohibitions of the 14th Amendment apply to all the instrumentalities of the State, to the legislative, executive, and judicial authorities, Chicago, Burlington, and Quincy Railroad v. Chicago, 166 U.S. 226, 233-4 (1897). The principle of due process is so firmly rooted in our jurisprudence as to require no citations in support of it. While the principle is familiar, its language, described as "cryptic and abstract" by one Court, Mullane v. Central Hanover Trust Co., 399 U.S. 306, 313 (1949), does not yield precise standards for the governance of

judicial proceedings. The case law suggests that flexible standards should apply, tailored to the particular circumstances of the case. See e.g. Anderson National Bank v. Luckett, 321 U.S. 233, 240 (1943). Flexibility is not synonymous with anarchy, however, and the procedures a Court adopts must meet the standards of fairness and reasonableness. As the U.S. Supreme Court stated in Armstrong v. Manzo, 380 U.S. 545, 552 (1964), the opportunity to be heard must be granted at a reasonable time and in a meaningful manner.

Under Illinois practice, a trial court, and probably an appellate court as well, has the inherent power to dismiss a cause for want of prosecution. Ryan v. Dixon, 28 Ill. App. 3d, 463, 466, 328 N.E. 2d, 672 (1975). But no judicial power, inherent or otherwise, can operate in disregard of constitu-

tional strictures. It does not comport with due process -- if that is understood as notice and opportunity to be heard -- when a court fails to promulgate rules governing dismissal of a cause for want of prosecution, fails to notify a party that such dismissal is pending, and fails to notify him that a dismissal order was entered against him. In such a situation, "only an oracle could point out the proper procedural road." Marino v. Ragen, 332 U.S. 561, 568 (1947) Underlying these omissions are two implicit premises, both of which are themselves repugnant to due process: first, that the court is a forum where those unschooled in the complexities of its procedures -- such as the pro se litigant -- are unwelcome; and second, that a party's right to a hearing on the merits is to be afforded minimal protection.

In Mathews v. Eldridge, 424 U.S. 319, 334-5 (1976), this court stated that procedural due process claims require con-

sideration of three factors: the private interest affected; the risk of erroneous deprivation; and the governmental interest, including the fiscal-administrative burden. The private interest affected here is the interest in a hearing on the merits. That this is an important interest is axiomatic. That this interest is jeopardized by a failure to receive actual notice, before or after the fact, of an order dismissing for want of prosecution is similarly axiomatic. The risk of erroneous deprivation of notice is a dismissal of the cause with prejudice, and a consequent extinguishment of the litigant's claim. The burden placed on the government to provide such notice is de minimus. A statement need only be printed on the briefing schedule issued by the court to warn the parties that a failure to meet the briefing schedule established by

the court may result in the dismissal of the cause without further notice. The Illinois Civil Practice Act (Ill.Rev.Stat. (1979), Ch. 110, Sec. 50.1) requires that such notice be provided a trial litigant against whom an order dismissing for want of prosecution was entered. This court has traditionally not questioned the wisdom of a state in regulating the procedures of its court. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). It is thus not an appropriate question for this tribunal as to why the Illinois legislature has required such notice to trial litigants but not to those before the appellate court. The fact that Illinois has instituted this procedure at the trial level, however, suggests that the state regards this procedure as feasible and not at undue variance with its interests. It would be no more burden-

some to the State of Illinois to provide this notice at the appellate level.

The void-for-vagueness doctrine, traditionally applied to legislative enactments, is a strand of due process analysis which is applicable here. If a statute were to define an offense but prescribe no penalty, it would be struck down as unconstitutionally vague; a statute must, inter alia, limit the discretion of law enforcement officials to minimize the danger of arbitrary and discriminatory enforcement. See e.g. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). A similar circumstance is found here; the Appellate Court of Illinois, First District, established a briefing schedule, but promulgated no rules to penalize the tardy litigant. The same potential for abuse is present in this situation as impressed this court in Papachristou

and other void-for-vagueness cases. See e.g. Grayned v. City of Rockford, 408 U.S. 104, 108-9, n. 4 (1972).

This court has long shown a deferential attitude toward the states in matters of local judicial procedure. The court has said that, as long as a local tribunal acts in consonance with the constitution, laws, and procedures of its own state, and as long as said constitution and laws are so interpreted as not to violate due process, it is only in exceptional circumstances that the Supreme Court would feel justified in intervening. Tracy v. Ginzberg, 205 U.S. 170 (1907), Allen v. Georgia, 166 U.S. 138, 140 (1897). In a similar vein, the Supreme Court has stated that mere irregularities or errors in matters of practice under state procedure do not generally sound in due process. Cross v. North Carolina, 132 U.S.

131, 140 (1889); Gryger v. Burke, 334 U.S. 728, 731 (1948). These cases may be distinguished from the case at bar, however, on the basis of their concern with errors in relation to established state procedure. In the instant case, there was no established state procedure and it is the absence of procedure which generates this due process claim. The distinction between the misapplication of procedure and the absence of procedure is the difference between isolated, atypical error and institutionalized, systematic violation of parties' rights.

These are lower court cases holding that a party to litigation is charged with the duty of keeping up with the cause, and is affected with notice of all subsequent proceedings; his actual want of notice is immaterial. Merrill on Notice (1952), Sec. 1119.

A close reading of the cases in support of this proposition, however, suggests that the doctrine of constructive notice is held to apply only when a reasonably diligent party would have had actual notice of the proceedings, or when equity requires the assertion of this doctrine as against a party claiming want of actual notice. In Oehmich v. Hedstrom, 251 Ill. 481, 96 N.E. 256 (1911), the plaintiff alleged ignorance of the sale of land in which he claimed an interest. The court noted that all proceedings regarding the sale were a matter of public record; that the records were available to the appellant; and that he was therefore charged with constructive notice of them. The court noted, however, at 462, that all of the sources of knowledge through which persons ordinarily obtain information regarding matters affecting their interests were open to the appellant, and that it was incon-

ceivable that he did not actually know of the land sale. Walline v. Olson, 84 Kan. 37, 113 P. 426 (1911), is a similar case in which the plaintiff sought to recover for unfaithful administration of an estate involving the sale of land. The sale had been made 25 years earlier, and the statute of limitations, if applicable, would have barred the action. While the Court found that the plaintiff had constructive notice of the sale, and the statute of limitations did apply, it noted that the plaintiff's own admissions suggested that she knew of the sale. The plaintiff in Asher v. Bone, 100 F. 2d, 315 (9th Cir., 1938), alleged that she had been deprived of an interest in a residuary estate through the issuance of an erroneous decree of the probate court. She sought to bar the application of the statute of limitations on the basis of her lack of

actual knowledge of the decree. The court denied her claim, holding that she could not both rely on the decree and claim no knowledge thereof.

B. The Equal Protection Claim

As noted in the Statement of the Case, the Appellate Court of Illinois, First District, often notifies the appellant's attorney of record that a dismissal order for want of prosecution is pending or has been entered. This courtesy is generally not extended to parties without counsel. The differential treatment of the two classes of appellant -- those represented by counsel and those not -- is a violation of plaintiff-appellant's right to equal protection of the laws, pursuant to the 14th Amendment to the Constitution of the United States. Said differential treatment

raises the question of whether the Appellate Court of Illinois may be operated as a "private club" with members of the appellate bar extended privileges not available to others.

Plaintiff-appellant contends, per the due process claim that he was entitled to notice of the dismissal order as of right, on the basis of due process considerations. Even if he would not otherwise be entitled to notice, however, its provision to one class of appellant but not the other, is sufficient to raise a constitutional claim. If an appeal is afforded, the state must not so structure it as to arbitrarily deny to some persons the rights and privileges available to others. Lindsey v. Normet, 405 U.S. 56, 77 (1972).

The traditional standard of equal protection review requires that a classification must be reasonable, not arbitrary, and must

rest on some ground of difference, having a fair and substantial relationship to the object of state action, so that all persons similarly circumstanced shall be treated alike. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Application of this standard has been associated with a restrained and deferential judicial attitude: "When the classification is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts must be assumed." Lindsley v. Natural Carbolic Gas Co., 220 U.S. 61, 78-79 (1911). In the instant case, a fact which might underly the Court's practice of distinguishing between the two categories of appellant is that it promotes judicial efficiency to do so. Addresses and telephone numbers of counsel might be more

readily available than those of parties. A search for means of contacting parties might involve unacceptable expenditures of court time.

Even if a rationale such as the foregoing were to be sufficient to meet the traditional standard of equal protection, when, however, the government legislates or acts on the basis of a fundamental right, the traditional standard of equal protection review is abandoned, and the Court exercises a strict scrutiny in which the government must demonstrate a compelling need and a necessary means of fulfilling it. Jayson et al (eds.): The Constitution of the United States of America: Analysis and Interpretation, 1972, p. 1474. These requirements contrast with the legitimate purpose and rational means test required under the traditional standard.

While the courts have never articulated a precise definition of fundamental rights, it is clear from the case law in which strict scrutiny has been applied, that they involve rights specifically guaranteed by the Constitution. Shapiro v. Thompson, 394 U.S. 618, (1969) (interstate travel); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (restrictions on voter eligibility); Williams v. Rhodes, 393 U.S. 23 (1968) (access to the ballot). Since due process of law is a specifically-enumerated constitutional right, it follows that strict scrutiny is the appropriate standard of review for determining the constitutionality of the differential treatment of parties represented by counsel, and those not so represented, in the Appellate Court. In the light of the strict scrutiny standard, the foregoing differential treatment is repug-

nant to the Constitution. The need for efficiency in governmental operations is not such as to defeat an equal protection claim when strict scrutiny is the standard of review. A case in point is Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), in which the United States Supreme Court invalidated the requirement that an indigent must have resided in the county for a year before receiving non-emergency health care at the county's expense. The Supreme Court, applying the strict scrutiny standard, swept aside the county's argument that its requirement promoted fiscal savings, reduced fraud, and led to more effective budgetary planning.

Recent equal protection cases have applied an intermediate standard of review when an important, although not fundamental, interest of the plaintiff is at issue.

This standard has required that an important state interest and a means substantially related to achieving it be involved to support a discriminatory classification. Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.S. 190, 200-202 (1976). This standard contrasts with the legitimate state interest and rational means test required under the traditional equal protection approach; and with the compelling state interest and necessary means test required under the strict scrutiny approach. When an important interest of the plaintiff is found, administrative efficiency -- as is true under strict scrutiny -- is not a sufficiently important state interest to justify discriminatory treatment. The "establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in

constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 405 U.S. 645, 656 (1972). Accord, Reed v. Reed, supra.

The courts have found the following to be examples of important interests of the plaintiff: ineligibility for employment in a major sector of the economy, Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976); retention of a driver's license, Bell v. Burson, 402 U.S. 535, 539 (1971); obtaining higher education at an affordable tuition, Vlandis v. Kline, 412 U.S. 441, 459 (1973). In each case, the interest involved had triggered the intermediate level of review. The interest of a party to an appeal in having an adjudication on the merits, is of equal dignity and importance as the foregoing. Even if the fundamental right of due

process is not at issue in the plaintiff-appellant's failure to have received notice of the dismissal of his claim, said failure remains constitutionally inadmissible.

C. Summary - The Significance of This Case

In deciding on whether to grant a writ of certiorari in this case, the court may wish to consider the following:

1. The issue of procedural due process in relation to state judicial procedure has not been before this court in over 45 years. Snyder v. Massachusetts, cited earlier in this petition, is one of the court's most recent pronouncements on the issue. It was decided in 1934. This case presents an opportunity for the court to review the issue in the light of its most recent conception of federalism, and in the light of its newest due process criteria,

as enunciated in Mathews v. Eldridge.

2. Previous decisions of this court on the constitutional sufficiency of state judicial procedure have, in fact, concerned some established procedure of the court. This case raises the novel and important question of whether the state may establish no procedure in an area which affects a party's notice and opportunity to be heard.

3. This case raises the issue of whether an appellant's right to a hearing on the merits is an important interest within the meaning of the "new" equal protection cases cited earlier.

Appendix

IN THE SUPREME COURT OF ILLINOIS

ALBERT R. KLINSKI, Plaintiff-Appellant, vs. FOUR WINDS TRAVEL, INC., Defendant-Appellee.	))))))))	Appeal from Appellate Court of Illinois, First District No. 80-1212

MOTION FOR LEAVE TO FILE A PETITION AS OF RIGHT, AND A PRAYER IN THE ALTERNATIVE, FOR LEAVE TO APPEAL INSTANTER

Now comes the plaintiff-appellant, ALBERT R. KLINSKI, by and through his counsel, VINCENT C. LOPEZ, and moves this Honorable Court for leave to file a petition as of right, and a prayer, in the alternative, for leave to appeal, pursuant to Supreme Court Rules 317 and 315 instanter. In support of this motion, plaintiff-appellant says as follows:

1. Plaintiff-appellant filed notice of appeal in this cause, by FRANCIS E. GOODMAN, Attorney at Law, in the Appellate

Court, First District, on April 10, 1980.

2. The Court entered an order establishing a briefing schedule on May 13, 1980. Appellant's brief, per the terms of the order, was due on October 9, 1980.

3. Plaintiff-appellant subsequently differed with his counsel, FRANCIS E. GOODMAN. Mr. Goodman moved to withdraw from the cause, and his motion was granted, per the order attached hereto as Exhibit A, on June 23, 1980. Mr. Goodman did not subsequently apprise plaintiff-appellant of the briefing schedule or otherwise indicate to him when the brief was due.

4. Immediately upon the withdrawal of FRANCIS E. GOODMAN, plaintiff-appellant diligently commenced to search for an attorney to prosecute his appeal. Over the next seven months, he spoke with six attorneys and made numerous inquiries among family,

friends, and acquaintances for the names of others before finding an attorney who would undertake to represent him.

5. Plaintiff-appellant retained his present counsel, VINCENT C. LOPEZ, and said counsel immediately commenced work on appellant's brief. On March 11, 1981, said counsel attempted to file a motion for leave to appear on behalf of plaintiff-appellant and for a new briefing schedule. He discovered at that time that the Appellate Court of Illinois, First District, had dismissed the cause for want of prosecution, on its own motion, on November 19, 1980. Prior to that time, neither plaintiff-appellant nor his newly-appointed counsel had any knowledge of said order for dismissal. Plaintiff-appellant did not receive notice of the pendency or the entry of said order, nor was any such notice sent to him by the

Clerk of the Appellate Court.

6. On April 6, 1981, plaintiff-appellant moved to vacate the order for dismissal and for VINCENT C. LOPEZ to appear instanter on his behalf. The motion to vacate the order of dismissal was based on lack of notice (paragraph 5, supra), on plaintiff-appellant's search for new counsel, and the fact that--as evidence of good faith and serious intent--an appellate brief had already been prepared.

7. The Court allowed VINCENT C. LOPEZ to appear, but denied the motion to vacate the order of dismissal for want of prosecution. The Court's order was entered on April 23, 1981.

8. In response to said order, plaintiff-appellant filed a motion for reconsideration, on May 15, 1981. Plaintiff-appellant alleged an infringment of his constitutional rights of due process and

equal protection of the law, under the 14th Amendment of the Constitution of the United States, on the basis of his not having received notice of the pendency of the motion of the Court or entry of the order dismissing his cause for want of prosecution. Plaintiff-appellant further sought leave, in his motion, to file the appellate brief which he had already prepared.

9. On May 20, 1981, plaintiff-appellant received a copy of the objection to his foregoing motions. Within 24 hours of the receipt of the aforesaid objections, plaintiff-appellant had prepared and tendered to the Clerk of the Court a motion for leave to file reply to the aforesaid objections, and a proposed reply to the aforesaid objections.

10. Along with the materials set forth in 9, supra, plaintiff-appellant, on

May 21, 1981, tendered his brief and a motion for leave to file same, to the Clerk of the Appellate Court, First District.

11. The Clerk of the Court refused the aforesaid tenders of the motion for leave to file reply to objections, proposed reply to objections, appellant's brief and motion for leave to file brief, when so tendered on May 21, 1981, for reason that an order denying the motion for reconsideration had been entered on that day.

12. On May 22, 1981, plaintiff-appellant filed with the Clerk of the Court a motion to reinstate the motion for reconsideration and for other relif, seeking, in essence, to reinstate his appeal and for leave to file his brief.

13. On May 29, 1981, the Appellate Court, First District, responded to the motion of plaintiff-appellant. It ordered that leave be allowed for plaintiff-

appellant to file reply to objections to motion for reconsideration, but denied the motion to reinstate the motion for reconsideration and for other relief.

14. On the basis of the infringement of his consitutional rights, plaintiff-appellant undertook to file a petition as of right in the Supreme Court of Illinois. When his counsel spoke with CLELL L. WOODS, Clerk of said Court, on June 16, 1981, counsel learned that the time limit for filing the petition began to run with the entry of the original order dismissing for want of prosecution, on November 19, 1980. The 56 day period for filing a petition specified in Supreme Court Rule 315 would therefore have ended on January 14, 1981, about the time counsel was retained.

15. Notwithstanding the foregoing expiration date, plaintiff-appellant now seeks leave to file a petition as of right,

and, in the alternative, a prayer for leave to appeal, based on the following grounds:

a. The fact that plaintiff-appellant did not file a timely petition in the Supreme Court goes to the very issue of this appeal, i.e., whether he was entitled to notice of the pendency and/or entry of the order dismissing his cause for want of prosecution. If he was so entitled, the 56 day period is tolled for his failure to receive said notice, and his petition in this court is still timely.

b. Counsel for plaintiff-appellant has diligently examined the Illinois and other case law regarding notice of judicial proceedings. While there is a general rule that a party to litigation is always charged with notice of judicial orders entered pursuant to rules of Court; and, in Illinois, there are cases holding that a court's procedural errors (such as

failure to give notice, when notice is required) do not sound in due process, counsel believes that these cases can readily be distinguished from the case at bar. The general rule of law is based on situations where the court has violated an established statute, rule or procedure. In the instant case, there was no established statute, rule or procedure. The distinction between the misapplication of a rule and the absence of a rule is the distinction between isolated, atypical error and the systematic violation of parties' rights. Said distinction is both material and significant, and appropriate for resolution by the Supreme Court. Even the most diligent party seeking to preserve his appeal, would be without any warning or notice from the Court as to the possibility of dismissal of his appeal.

c. Plaintiff-appellant has at all times acted with all diligence which

could reasonably be expected of a lay person in prosecuting this appeal. He is entirely without knowledge of court procedures, did not know of the briefing schedule, and did not know his appeal was in jeopardy. In searching for new counsel, he relied on his absence of notice as indicating that his appeal was in good standing and in compliance with all rules of the Court.

d. Defendant-appellee has contended below that he has an equitable right to rely on the final order of the Appellate Court dismissing this cause. It is anticipated that he will raise the same point in response to the instant motion. However, a final order which deprives a party of his substantial rights and wrongfully precludes a full and fair hearing of his cause does not constitute a justifiable basis for such reliance. If it did, there would be no appellate courts.

e. It is within the discretion of the Supreme Court, per its rule 315(b), to allow an extension of time for the filing of a petition.

16. Plaintiff-appellant humbly believes that his appeal has substantial merit. His suit in the trial court set up that he was a passenger on a conducted tour of the Continent of Africa and that during the final days of the tour he was subjected to outrageous verbal abuse and public opprobrium by the agent of the tour operator. He, known to the tour operator to be a person of unusual and peculiar sensitivities, then sustained great emotional distress which was very severe and lasted over a long period after the completion of the tour, interfering with his ability to earn a living. In the trial court the suit was dismissed for failure to state a cause of action.

Plaintiff-appellant asserts that his brief to the appellate court raises novel and significant issues, the resolution of which would be most beneficial to the rubric of Illinois law. In addition to whether the complaint states a cause of action for outrageous behavior constituting an intentional infliction of emotional distress, these issues are: whether Illinois law will allow recovery for intentional infliction of emotional distress on a plaintiff of peculiar and known sensitivities; and whether a tour operator is to be held to the standard of courtesy and care in its acts which applies to common carriers and innkeepers.

Respectfully submitted,

_____

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Appendix

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SUPREME COURT OF THE UNITED STATES

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Respondent.

Supplemental Appendix to

Petition For A Writ of Certiorari

To The Supreme Court of Illinois

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Chicago, IL 60601

In re: Albert R. Klinski, petitioner, vs. Four Winds Travel, Inc., respondent. No. 55472

Dear Mr. Lopez:

The Supreme Court today made the following announcement concerning the above entitled cause:

> The motion by petitioner for leave to file instanter petition for appeal as a matter of right, or in the alternative, for leave to appeal is denied.

Very truly yours,

/s/ Clell Woods
Clerk of the
Supreme Court

CLW:jae
cc: John C. Kiely

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALBERT R. KLINSKI, Plaintiff-Appellant, vs FOUR WINDS TRAVEL, INC., Defendant-Appellee.	No. 80-1212

O R D E R

This matter comes to be heard on a "motion to reinstate motion for reconsideration and for other relief" and "reply to objection to motion for reconsideration," by the plaintiff-appellant, Albert R. Klinski.

IT IS HEREBY ORDERED that leave is granted to the plaintiff-appellant to reply to objection to motion for reconsideration.

IT IS FURTHER ORDERED that the motion to reinstate the motion for the motion for reconsideration and for other relief is denied.

Dated at Chicago, Illinois, this 29th day of May, 1981.

ENTER: ORDER ENTERED
MAY 29 1981

/s/ PHILIP ROMITI,
Justice

/s/ MEL R. JIGANTI,
Justice

/s/ DAVID LINN,
Justice

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FOURTH DIVISION

ALBERT R. KLINSKI, Plaintiff-Appellant,	)	
vs	)	No. 80-1212
FOUR WINDS TRAVEL, INC., Defendant-Appellee.	)	

O R D E R

This cause coming on to be heard on the motions of plaintiff-appellant for leave to file Motion for Reconsideration of the motion to vacate the dismissal for want of prosecution herein and on the Motion for Reconsideration as aforesaid, the Court being well informed:

IT IS THEREFORE ORDERED THAT:

A. Leave shall be and is hereby given to file the Motion for Reconsideration of the motion to vacate the order of dismissal for want of

prosecution heretofore entered on November 19, 1980.

B. The Motion for Reconsideration of the motion to vacate the order dismissing this cause for want of prosecution is denied.

May 21, 1981

ENTER:

/s/ PHILIP ROMITI,
Judge

/s/ MEL R. JIGANTI,
Judge

/s/ DAVID LINN,
Judge

VINCENT C. LOPEZ
Attorney for Plaintiff-Appellant
188 West Randolph Street
Chicago, Illinois 60601
236-2222

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALBERT R. KLINSKI, Plaintiff-Appellant,	)	
vs	)	No. 80-1212
FOUR WINDS TRAVEL, INC., Defendant-Appellee.	)	

O R D E R

This matter comes to be heard on a motion by the plaintiff-appellant, Albert R. Klinski, for leave to Vincent C. Lopez to appear for the plaintiff-appellant.

This matter also comes to be heard on a motion to vacate a default entered in this case on November 19, 1980.

IT IS HEREBY ORDERED that the motion for leave of Vincent C. Lopez to appear on behalf of the plaintiff-appellant is allowed.

IT IS FURTHER ORDERED that the motion to vacate the order of dismissal dated November 19, 1980 is denied.

Dated at Chicago, Illinois, this 23rd day of April, 1981.

ENTER: ORDER ENTERED
APRIL 23 1981

/s/ PHILIP ROMITI,
Justice

/s/ MEL R. JIGANTI,
Justice

/s/ DAVID LINN,
Justice.

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

ALBERT R. KLINSKI, Plaintiff-Appellant,	)	
V.	)	No. 80-1212
FOUR WINDS TRAVEL, INC., Defendant-Appellee.	)	

ORDER

This cause coming on for hearing on the motion of plaintiff-appellant, ALBERT RL KLINSKI, for leave to file a reply to the objection of defendant-appellee to the motion of plaintiff-appellant to vacate dismissal for want of prosecution,

IT IS ORDERED, that leave is hereby granted ALBERT R. KLINSKI, to file a reply to the objection of defendant-appellee instanter.

ORDER ENTERED APR 23 1981

/s/ PHILIP ROMITI,
Justice

VINCENT C. LOPEZ
Attorney for Plaintiff-Appellant
188 W. Randolph
Chicago, Illinois 60601
(312) 236-2222

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALBERT R. KLINSKI, Plaintiff-Appellant,	)	
-vs-	)	No. 80-1212
FOUR WINDS TRAVEL, INC., Defendants-Appellees.	)	

ORDER

This matter comes to be heard on the court's own motion. It appears to the court that the appellant has failed to file its brief within the allotted time.

IT IS HEREBY ORDERED that this cause is dismissed for want of prosecution.

Dated at Chicago, Illinois, this 19th day of November, 1980.

ENTER: ORDER ENTERED
NOV 19 1980

/s/ PHILIP ROMITI,
Justice

/s/ MEL R. JIGANTI,
Justice

/s/ DAVID LINN,
Justice.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FIRST DIVISION

ALBERT R. KLINSKI, Plaintiff-Appellant	)	
vs.	)	No. 80-1212
FOUR WINDS TRAVEL, INC. Defendant-Appellee	)	

PROPOSED ORDER

This honorable court having read the Motion to Withdraw submitted by Plaintiff-Appellant's attorney, FRANCIS E. GOODMAN, and any response thereto by Defendant-Appellee and being satisfied that proper notice has been given to the Plaintiff-Appellant, ALBERT R. KLINSKI, hereby does grant FRANCIS E. GOODMAN leave to withdraw as attorney for Plaintiff-Appellant, ALBERT R. KLINSKI.

/s/ JOHN J. STAMOS
APPELLATE COURT JUSTICE
ORDER ENTERED JUN 23 1980

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

ALBERT KLINSKI, Plt-appellant	)	
v.	)	No. 80-1212
FOUR WINDS TRAVEL, INC. def-appellee	)	

ORDER

In the above captioned appeal, the notice of appeal was filed on April 11, 1980. The docketing statement filed with this court (has/) been received and based upon the nature of the case, the following time schedule shall apply:

Record pursuant to Sup Ct Rule 321	July 11, 1980
Appellant's Brief	Oct. 9, 1980
Appellee's Brief	Dec. 23, 1980
Reply Brief, if any	Jan. 6, 1981

ORDER ENTERED MAY 13 1980

/s/ ROBERT J. DOWNING,
Justice

76 L 12058

Opposition

81-1473

No. 81-1475

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALBERT R. KLINSKI,

Petitioner,

v.

FOUR WINDS TRAVEL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS D. MORRISSEY
BAKER & MCKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2819

Attorney for Respondent,
FOUR WINDS TRAVEL, INC.

Of Counsel:
JOHN C. KIELY
EUGENE F. MCMAHON
GERALD L. MAATMAN, JR.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether this Court can exercise jurisdiction over petitioner's alleged federal question notwithstanding the fact that petitioner failed to appeal the question to the Illinois Supreme Court within the time limits proscribed by Illinois procedural law, that petitioner waived his alleged federal question by raising it in an untimely motion for reconsideration of an appellate court order denying his original motion that failed to assert a federal question, and that the order of the Illinois Supreme Court rests upon adequate and independent state law grounds.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALBERT R. KLINSKI,

Petitioner,

v.

FOUR WINDS TRAVEL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

On September 16, 1981, the Supreme Court of Illinois denied without opinion petitioner's appeal from an order of the Appellate Court of Illinois for the First Judicial District, entered on May 29, 1981.

JURISDICTION

This Court lacks jurisdiction to review petitioner's writ of certiorari. The order of the Supreme Court of Illinois rests on "adequate" and "independent" state law grounds. Petitioner's noncompliance with state procedural law for the timely raising and proper presentation of his alleged federal question precludes this Court's jurisdiction.

STATUTES INVOLVED

315. (Supreme Court Rule 315). Leave to Appeal From the Appellate Court to the Supreme Court

(b) Time; Contents. The petition for leave to appeal shall be filed in the Supreme Court within 56 days after the entry of the judgment appealed from if no petition for rehearing is filed, or, if a petition for rehearing is filed, within 35 days after the denial of the petition or the entry of the judgment on rehearing. Motions to extend the time for petitioning for leave to appeal are not favored and will be allowed only in the most extreme and compelling circumstances. . . .

317. (Supreme Court Rule 317). Appeals from the Appellate Court to the Supreme Court as of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition in the form prescribed by

Rule 315, except that the petition shall be entitled "Petition for Appeal as a Matter of Right", item (1) of the petition shall state that the appeal is taken as a matter of right, and item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right. In other respects the procedure is governed by Rule 315. . . .

STATEMENT OF THE CASE

On April 9, 1981, petitioner filed a motion in the Appellate Court of Illinois for the First Judicial District seeking to vacate an order of November 19, 1980, which dismissed his appeal for want of prosecution (A-1). Section 50(5) of the Illinois Civil Practice Act, Ill. Rev. Stat. 1977, ch. 110, § 50(5), requires that a party seeking to vacate an order of dismissal for want of prosecution file a motion to that effect within 30 days of the order of dismissal. Petitioner also failed to assert in this motion any federal or constitutional questions that are now purportedly before this Court. The appellate court denied petitioner's motion without opinion on April 23, 1981 (Pet. Supp. App.-6).

On May 15, 1981, petitioner filed a motion for reconsideration of the order entered April 23, 1981 (A-7). Illinois Supreme Court Rule 367(a) mandates that motions for reconsideration be filed within 21 days after the issuance of an opinion. Petitioner, however, filed his motion for reconsideration on May 15, 1981, 2[illegible] days after the appellate court's order of April 23, 198[illegible] Moreover, only in his untimely motion did the petitioner finally raise the due process and equal protection questions now

presented to this Court. The appellate court denied petitioner's second untimely motion without opinion on May 21, 1981 (Pet. Supp. App.-4).

On May 22, 1981, petitioner filed a third motion, which sought to reinstate his earlier motion for reconsideration. The appellate court denied petitioner's motion without opinion on May 29, 1981 (Pet. Supp. App.-2).

On September 1, 1981, petitioner filed a motion for leave to appeal, and in the alternative, for appeal as a matter of right from the orders of the appellate court denying his motions to vacate the dismissal of his appeal for want of prosecution (Pet. App.-1). Illinois Supreme Court Rules 315(b) and 317 mandate that appeals from appellate court decisions be perfected within 56 days after the entry of judgment or 35 days after the denial of a petition for rehearing. Petitioner filed his motion for leave to appeal 94 days after the appellate court's final order. The Illinois Supreme Court denied petitioner's motion without opinion on September 16, 1981 (Pet. Sup. App.-1).

REASONS FOR DENYING PETITIONER'S WRIT

I.

PETITIONER'S FAILURE TO PROPERLY PURSUE AN APPEAL ON HIS ALLEGED FEDERAL CLAIMS BEFORE THE ILLINOIS SUPREME COURT CONSTITUTES ADEQUATE AND INDEPENDENT STATE LAW GROUNDS TO PRECLUDE THIS COURT'S JURISDICTION OVER PETITIONER'S WRIT.

It is axiomatic that a failure to follow state procedures in raising federal questions constitutes an adequate non-federal ground of decision preventing this Court's exercise of jurisdiction. This Court has stated that "[t]he reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1943). Thus, failure of proper presentation of federal claims in state courts precludes this Court's review of a petitioner's writ. *Beck v. Washington*, 369 U.S. 541, 549-54 (1962); *John v. Paulin*, 231 U.S. 583, 585 (1913). This rule is jurisdictional. In Mr. Justice Harlan's words, "[t]he rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968) (dissent).

In the instant case, petitioner wholly failed to pursue his purported federal claims by seeking review of the order of the Appellate Court for the First Judicial District in the Illinois Supreme Court. On May 29, 1981, the appellate court denied petitioner's motion for reconsideration of an order entered on May 21, 1981. The

order of May 21, 1981 denied petitioner's motion to reconsider an order that dismissed his appeal for want of prosecution. Under Illinois Supreme Court Rules 315(b) and 317, petitioner had 35 days to seek review in the Illinois Supreme Court, i.e., by July 6, 1981. Petitioner, however, filed his motion for leave to appeal on September 1, 1981, well past the 35-day requirement for perfecting appeals in the Illinois Supreme Court.

The jurisdictional statute permitting this Court to review state court cases encompasses only final judgments and orders rendered "by the highest court of a state in which a decision could be had." 28 U.S.C. § 1257 (1976). *See Costarelli v. Massachusetts*, 421 U.S. 193, 195 n.3 (1975). Where discretionary review of intermediate state appellate court judgments is available, the exercise of that discretion must be sought in order to comply with this Court's jurisdictional requirements under 28 U.S.C. § 1257. *Banks v. California*, 395 U.S. 708 (1969). Yet, where a state's highest court denies an appeal from an intermediate appellate court based on a failure to conform to state rules of practice in perfecting the appeal, neither the order dismissing the appeal nor the intermediate appellate court decree is reviewable. *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1950); *Newman v. Gates*, 204 U.S. 89 (1907). This Court has repeatedly held that jurisdiction is lacking where state procedural law requirements are not observed by a petitioner. *Pennsylvania R. Co. v. Illinois Brick*, 297 U.S. 447, 462-63 (1936); *Erie R. Co. v. Purdy*, 185 U.S. 148 (1901).

Petitioner's noncompliance with Illinois Supreme Court Rules 315(b) and 317 for perfecting his appeal is patent; the Illinois Supreme Court denied petitioner's appeal without opinion because petitioner filed his appeal some

94 days after the entry of the appellate court's order. This Court has squarely held that a state supreme court's dismissal of an appeal for untimely filing of a brief is an adequate state ground precluding jurisdiction. *McKinney v. City of Birmingham*, 409 U.S. 895 (1972) (as explained in *McKinney v. Parsons*, 423 U.S. 960, 961 (1975)). In legal effect, petitioner's case stands as though no appeal was taken from the orders of the intermediate appellate court. Accordingly, the statutory prerequisite for this Court's jurisdiction is absent. As the jurisdiction of this Court to review the judgments of state courts when a federal question is presented is limited to the review of a final judgment or decree rendered by the state's highest court actually or constructively deciding such a question, petitioner's failure to perfect his appeal in the Illinois Supreme Court precludes this Court's jurisdiction.

This Court has stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). The decision of the Illinois Supreme Court must be presumed to rest on petitioner's noncompliance with procedural rules for perfecting an appeal in the Illinois Supreme Court. *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *Mutual Life Insurance Co. v. McGraw*, 188 U.S. 291, 308-09 (1903). Petitioner's noncompliance with Illinois Supreme Court Rules 315(b) and 317 is patent.

The petition for certiorari filed with this Court fails to demonstrate that the judgment of the Illinois Supreme Court is unsupported by adequate and independent state law grounds. A statement by Mr. Justice Clark in *Williams v. Georgia*, 349 U.S. 375, 399 (1955) (dissent),

best expresses the circumstances where a purported state ground is not independent or adequate:

> First, where the circumstances give rise to an inference that the state court is guilty of an evasion—an interpretation of state law with the specific intent to deprive a litigant of a federal right. Second, where the state law, honestly applied though it may be, and even dictated by the precedents, throw such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

Neither of these circumstances is applicable in this instance.

Petitioner's noncompliance with Illinois Supreme Court Rules 315(b) and 317 was his own doing. He had notice of these time limitations and failed to act accordingly. This Court has held that a litigant is not excused from pursuing his alleged federal question in the manner and with the degree of specificity required by state rules of practice. *John v. Paulin*, 231 U.S. 583 (1918). Moreover, the denial of petitioner's appeal by the Illinois Supreme Court is unquestionably supported by previous decisions of that court. *Ledingham v. Blue Cross Plan for Hospital Care of Hospital Service Corp.*, 64 Ill. 2d 338, 342 (1976); *Bradford Supply Co. v. Waite*, 392 Ill. 318, 329 (1946). The order of the Illinois Supreme Court cannot be deemed to constitute a deprivation of petitioner's federal rights when petitioner himself failed to properly invoke that court's review of his claims.

The application of Illinois Supreme Court Rules 315(b) and 317 to deny petitioner's untimely appeal does not pose an unreasonable interference with the vindication of his federal rights. Having full knowledge of such a

basic state procedural rule, petitioner waived his ground for appeal by his own inaction. As this Court stated in *John v. Paulin*, 231 U.S. 583, 585 (1918):

> Without any doubt it rests with each state to proscribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case law turns entirely upon questions of local or general law.

In sum, the order of the Illinois Supreme Court denied petitioner's appeal on the nonfederal ground of failure of proper presentation of claims by timely perfection of appeal. Therefore, adequate and independent state law grounds preclude this Court's review of the instant petition for certiorari.

II.

THIS COURT HAS NO JURISDICTION FOR THE ADDITIONAL REASON THAT ADEQUATE AND INDEPENDENT STATE GROUNDS EXIST BY WAY OF PETITIONER'S FAILURE TO RAISE HIS FEDERAL QUESTION IN A PROPER MANNER OR IN THE TIME REQUIRED BY STATE PROCEDURAL LAW.

This Court is precluded from exercising its jurisdiction for the additional reason that petitioner failed to present a federal question in accordance with the state rules governing the pursuit of issues on appeal. Petitioner presented various motions to the Appellate Court of Illinois for the First Judicial District without any statutory authority as provided in the Illinois Civil Practice Act. On April 6, 1981, petitioner sought to vacate an order entered by the appellate court dismissing his appeal for want of prosecution. The appellate court denied petitioner's motion on April 23, 1981.

Assuming arguendo that petitioner complied with state procedural rules, he did not advance a constitutional objection or federal question in regard to the appellate court's dismissal of his appeal for want of prosecution. *See* A-1. Under the decisions of this Court, the petitioner therefore waived his federal claims. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919).

Petitioner did not raise the constitutional questions, which he now advances in this petition for writ of certiorari in this Court, until a second, untimely motion filed with the Illinois Appellate Court on May 15, 1981. Illinois Supreme Court Rule 367 mandates that a motion for reconsideration be filed within 21 days of a decision of an appellate court. Since the appellate court denied petitioner's original motion on April 23, 1981, petitioner had until May 14, 1981 to file a motion for reconsideration. Petitioner wholly failed to comply with this state procedural rule. This also constitutes a waiver of his federal question because petitioner failed to present his claim in a timely manner. Certainly Illinois may attach reasonable time limitations to the assertion of a federal constitutional claim, and this Court must respect such limitations. *Michel v. Louisiana*, 350 U.S. 91, 97 (1955). In the circumstances of this case, Illinois requires that any ground, federal or non-federal, be asserted within 21 days of an appellate court order. Noncompliance is deemed to be a waiver and constitutes a second adequate and independent state ground to support the denial of petitioner's appeal by the Illinois Supreme Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent respectfully submits that this Court should dismiss this Petition for Writ of Certiorari.

Respectfully submitted,

FRANCIS D. MORRISSEY
BAKER & MCKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2819

Attorney for Respondent,
FOUR WINDS TRAVEL, INC.

Of Counsel:

JOHN C. KIELY
EUGENE F. MCMAHON
GERALD L. MAATMAN, JR.

Appendix

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALBERT R. KLINSKI, Plaintiff-Appellant,	)	
vs.	)	No. 80-1212
FOUR WINDS TRAVEL, INC., Defendant-Appellee.	)	

MOTION

[Filed April 9, 1981]

Now comes plaintiff-appellant ALBERT R. KLINSKI, by and through his attorney VINCENT C. LOPEZ and moves this Honorable Court for the following belief:

A. To vacate the order for dismissal for want of prosecution entered herein on November 19, 1980.

B. For leave to VINCENT C. LOPEZ to appear instanter on behalf of plaintiff-appellant.

C. To enter a new scheduling order.

In support of the aforesaid Motion, plaintiff-appellant states that:

1. The original appeal herein was filed by Francis E. Goodman as attorney for plaintiff-appellant and this court entered a scheduling order on May 13, 1980, a copy of which is attached hereto as Exhibit "A".

2. Francis E. Goodman thereafter withdrew as counsel for plaintiff-appellant by order of this court entered on June 23, 1980, a copy of which is attached hereto as Exhibit "B". Thereafter plaintiff-appellant, ALBERT R. KLINSKI was pro se in this matter.

3. Thereafter, on November 19, 1980 this court dismissed this cause for want of prosecution. As is shown by a copy of the order entered on such date attached hereto as Exhibit "C".

4. Thereafter VINCENT C. LOPEZ was retained to represent plaintiff-appellant in this matter and to prosecute this appeal.

5. The fact of the entry of this order for dismissal for want of prosecution was first discovered by counsel for plaintiff-appellant on March 11, 1981 when said counsel attempted to file a motion for leave to appear on behalf of plaintiff-appellant. Prior to that time neither plaintiff-appellant nor his newly appointed counsel had any knowledge of the entry of said order for dismissal for want of prosecution.

6. The brief for plaintiff-appellant is now substantially completed and is in a preliminary draft form and can be completed and filed expeditiously if the court grants this motion.

7. The Affidavit of plaintiff-appellant is attached hereto as Exhibit "D" and made a part hereof.

Respectfully submitted,

/s/ VINCENT C. LOPEZ

EXHIBIT A

IN THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

ALBERT R. KLINSKI,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 80-1212
	)	
FOUR WINDS TRAVEL, INC.,	)	
	)	
Defendant-Appellee.	)	

ORDER

[Entered May 13, 1980]

In the above captioned appeal, the notice of appeal was filed on April 11, 1980. The docketing statement filed with this court has been received and based upon the nature of the case, the following time schedule shall apply:

Record pursuant to Supreme Court Rule 321 July 11, 1980

Appellant's Brief October 9, 1980

Appellee's Brief December 23, 1980

Reply Brief, if any January 6, 1981

/s/ ROBERT J. DOWNING

EXHIBIT B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FIRST DIVISION

ALBERT R. KLINSKI,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 80-1212
	)	
FOUR WINDS TRAVEL, INC.,	)	
	)	
Defendant-Appellee.	)	

PROPOSED ORDER

[Entered June 23, 1980]

This honorable court having read the Motion to Withdraw submitted by Plaintiff-Appellant's attorney, FRANCIS E. GOODMAN, and any response thereto by Defendant-Appellee and being satisfied that proper notice has been given to the Plaintiff-Appellant, ALBERT R. KLINSKI, hereby does grant FRANCIS E. GOODMAN leave to withdraw as attorney for Plaintiff-Appellant, ALBERT R. KLINSKI.

/s/ JOHN J. STAMOS

EXHIBIT C

IN THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

ALBERT R. KLINSKI,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 80-1212
	)	
FOUR WINDS TRAVEL, INC.,	)	
	)	
Defendant-Appellee.	)	

ORDER

[Entered November 19, 1980]

This matter comes to be heard on the court's own motion. It appears to the court that the appellant has failed to file its brief within the allotted time.

IT IS HEREBY ORDERED that this cause is dismissed for want of prosecution.

Dated at Chicago, Illinois, this 19th day of November, 1980.

ENTERED:

/s/ PHILIP ROMITI
Justice

/s/ MEL R. JIGANTI
Justice

/s/ DAVID LINN
Justice

EXHIBIT D

STATE OF ILLINOIS
COUNTY OF COOK—SS

AFFIDAVIT

ALBERT R. KLINSKI on oath first duly sworn deposes and states that:

1. Affiant is the plaintiff-appellant in the matter of ALBERT R. KLINSKI vs. FOUR WINDS TRAVEL, INC., number 80-1212 in the Appellate Court, State of Illinois, First District.

2. Notice of appeal in this matter was filed by Francis E. Goodman, Attorney at Law, on behalf of plaintiff-appellant.

3. Thereafter Francis E. Goodman withdrew from representation of plaintiff-appellant.

4. Thereafter affiant secured the file from Francis E. Goodman and diligently search for new counsel.

5. Thereafter, plaintiff-appellant retained VINCENT C. LOPEZ as counsel to prepare a brief and prosecute the appeal in this matter.

6. Affiant has never received any notice of the entry of an order for dismissal for want of prosecution in this matter and desires that this matter be reinstated so that it may be heard by this court.

Further Affiant sayeth not.

/s/ ALBERT R. KLINSKI

[Notary omitted in printing.]

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FOURTH DIVISION

ALBERT R. KLINSKI,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 80-1212
	)	
FOUR WINDS TRAVEL, INC.,	)	
	)	
Defendant-Appellee.	)	

MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

[Filed May 15, 1981]

Now comes plaintiff ALBERT R. KLINSKI by his attorney VINCENT C. LOPEZ, and moves the Court for leave to file his Motion for Reconsideration of the motion of plaintiff to vacate the dismissal for want of prosecution herein, and in support thereof, states that said motion for reconsideration was inadvertently labeled as a petition for rehearing and presented to the Clerk of this Court for filing on May 14, 1981, at which time the Clerk declined to accept same for filing for the reason that its format did not conform to the rules of Court pertaining to the filing of briefs. The Motion for Reconsideration has now been properly titled and is submitted herewith.

Respectfully submitted,

/s/ VINCENT C. LOPEZ
Attorney for Plaintiff

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FOURTH DIVISION

ALBERT R. KLINSKI,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 80-1212
	)	
FOUR WINDS TRAVEL, INC.,	)	
	)	
Defendant-Appellee.	)	

MOTION FOR RECONSIDERATION

[Filed May 15, 1981]

Now comes plaintiff, ALBERT R. KLINSKI, plaintiff-appellant in the above-entitled cause, by his attorney, VINCENT C. LOPEZ, respectfully represents that certain points were overlooked or misapprehended by the court in its determination of the motion to vacate the dismissal for want of prosecution herein, moves the Court to reconsider same, and states the following in support thereof:

I

The court's order of November 14, 1980, dismissing the cause for want of prosecution, is a violation of appellant's right to due process of law under the 14th Amendment of the Constitution of the United States. Due process requires that a party have the opportunity to be heard before he is subject to the exercise of governmental power. Appellant did not receive notice that the court was considering the dismissal of his cause. He was

therefore deprived of his opportunity timely to contest this action. As set forth in the attached affidavit of Richard P. Glasser, of counsel for plaintiff, which is made a part hereof as Exhibit A, the court has promulgated no general order, nor does it have fixed standards, regarding how much time must elapse before it will dismiss for want of prosecution. The absence of clear standards, promulgated in a general order, works as a further violation of appellant's due process rights. Clear standards, which are readily ascertainable, would put the party on notice of an impending action and afford him the opportunity to respond to it.

II

The failure of the court to have advised the appellant that it was considering the dismissal of his cause, on the court's own motion, is a violation of the appellant's right to equal protection under the 14th Amendment of the Constitution of the United States. It is often the practice of the court to notify appellant's counsel of the pendency of such dismissal, but there is not similar practice with respect to appellants without counsel (see the attached affidavit). At the time of the court's order of dismissal, and for approximately six months prior to said order, the appellant was without representation by counsel. He was not contacted by the court to advise him that he would need to take affirmative steps to prevent the dismissal of his claim. As set forth in the attached affidavit, the appellant's address was available to the court. The fact that parties represented by counsel are often given notice of pending dismissal, while the present appellant, who was pro se in his cause, was not given notice, constitutes an unlawful, unprivileged, and unconstitutional discrimination.

III

The failure of the court to have notified the appellant of the entry of its order of dismissal is a violation of both his due process and equal protection rights under the 14th Amendment of the Constitution of the United States. While the order was published in the *Daily Law*

Bulletin, said publication is insufficient to meet constitutional due process criteria. These require that a method of notification provide an available means of information to one who is reasonably diligent in protecting his own interests. *Sputurno v. Woods*, 192 A. 689 (Del., 1937). It is unlikely that notice published in the *Daily Law Bulletin* would come to the attention of a diligent lay person.

As in II, *supra*, notice of the entry of an order is provided to parties represented by counsel (see the attached affidavit). That appellant was not represented by counsel and therefore did not receive notice is a violation of his constitutional right to equal protection.

IV

Appellant is earnest in his pursuit of this appeal, and has acted with diligence within the context of his knowledge of court procedures. He has already prepared a brief which he seeks leave to file.

V

Plaintiff-appellant incorporates herein his affidavits previously filed in this matter, copies of which are attached hereto as Exhibits B and C.

Respectfully submitted,

/s/ VINCENT C. LOPEZ
Attorney for Plaintiff

EXHIBIT A
To *Motion For Reconsideration* Only

STATE OF ILLINOIS
COUNTY OF COOK—SS

AFFIDAVIT

RICHARD P. GLASSER on oath first duly sworn deposes and states that:

1. Affiant is an att rney who is of counsel to the present attorney of rec d in the matter of ALBERT R. KLINSKI vs. FOUR WINDS TRAVEL, INC., number 80-1212 in the Appellate Court, State of Illinois, First District.

2. Affiant spoke with Gilbert Marchman, Chief Clerk of said Court, via telephone, at 10:00 A.M. on May 4, 1981.

3. In response to affiant's questions, Gilbert Marchman related the following to the affiant:

a. The Appellate Court of Illinois, First District, has promulgated no General Order regarding the dismissal of a cause for want of prosecution.

b. The Appellate Court of Illinois, First District, has no fixed standard for determining at what point past the due date for filing a brief, it will dismiss the cause for want of prosecution.

c. The Court's administrative attorney or clerk will usually contact appellant's counsel to warn him that the Court is considering dismissal for want of prosecution. No such contact will be made in the case of an appellant not represented by counsel.

d. After entry of an order dismissing for want of prosecution, notice is sent to the appellant's attorney of record. If there is no attorney of record, notice is sent to the appellant if his address is known to the Court. If his address is not known to the Court, the only notice which is provided is publication in the *Daily Law Bulletin.*

4. On May 14, 1981, affiant examined the clerk's docket sheet for *KLINSKI vs. FOUR WINDS TRAVEL, INC.* Said docket sheet contained the address of neither the plaintiff-appellant nor either attorney of record.

5. On May 11, 1981, affiant examined the Court file on the matter of *KLINSKI* vs. *FOUR WINDS TRAVEL, INC.* Page 27 of the record, consisting of answers to interrogatories filed by plaintiff-appellant on April 30, 1979, contained plaintiff-appellant's address.

Further Affiant sayeth not.

/s/ RICHARD P. GLASSER

[Notary omitted
in printing.]

EXHIBIT B
To *Motion For Reconsideration* Only

STATE OF ILLINOIS
COUNTY OF COOK—SS

AFFIDAVIT

ALBERT R. KLINSKI on oath first duly sworn deposes and states that:

1. Affiant is the plaintiff-appellant in the matter of ALBERT R. KLINSKI vs. FOUR WINDS TRAVEL, INC., number 80-1212 in the Appellate Court, State of Illinois, First District.

2. Notice of appeal in this matter was filed by Francis E. Goodman, Attorney at Law, on behalf of plaintiff-appellant.

3. Thereafter Francis E. Goodman withdrew from representation of plaintiff-appellant.

4. Thereafter affiant secured the file from Francis E. Goodman and diligently search for new counsel.

5. Thereafter, plaintiff-appellant retained VINCENT C. LOPEZ as counsel to prepare a brief and prosecute the appeal in this matter.

6. Affiant has never received any notice of the entry of an order for dismissal for want of prosecution in this matter and desires that this matter be reinstated so that it may be heard by this court.

Further Affiant sayeth not.

/s/ ALBERT R. KLINSKI

SUBSCRIBED AND SWORN to
before me this 6th day of
April, 1981.

NOTARY PUBLIC

EXHIBIT C
To *Motion For Reconsideration* Only

STATE OF ILLINOIS
COUNTY OF COOK—SS

AFFIDAVIT

ALBERT R. KLINSKI on oath first duly sworn deposes and states that:

1. Affiant is the plaintiff-appellant in the matter of ALBERT R. KLINSKI vs. FOUR WINDS TRAVEL, INC., number 80-1212 in the Appellate Court, State of Illinois, First District.

2. Immediately upon the withdrawal of FRANCIS E. GOODMAN from representation of the plaintiff-appellant which took place on June 23, 1980, affiant diligently commenced to search for an attorney to handle the appeal in this matter in his behalf.

3. Over the next seven months affiant inquired of family, friends and acquaintances for names of attorneys who might be appropriate to represent him in handling this appeal. During that period affiant further consulted with six attorneys before being able to secure an attorney who would undertake to represent him in the prosecution of this appeal.

4. Affiant has no knowledge of the rules and procedures of the Appellate Court of Illinois in which this case has been pending.

FURTHER Affiant sayeth not.

/s/ ALBERT R. KLINSKI

[Notary omitted
in printing.]

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FOURTH DIVISION

ALBERT R. KLINSKI,	)	
	)	
Plaintiff-Appellant,	)	
vs.	)	No. 80-1212
FOUR WINDS TRAVEL, INC.,	)	
	)	
Defendant-Appellee.	)	

ORDER

(Order Filed May 21, 1981)

This cause coming on to be heard on the motions of plaintiff-appellant for leave to file Motion for Reconsideration of the motion to vacate the dismissal for want of prosecution herein and on the Motion for Reconsideration as aforesaid, the Court being well informed:

IT IS THEREFORE ORDERED THAT:

A. Leave shall be and is hereby given to file the Motion for Reconsideration of the motion to vacate the order of dismissal for want of prosecution heretofore entered on November 19, 1980.

B. The Motion for Reconsideration of the motion to vacate the order dismissing this cause for want of prosecution is denied.

May 21, 1981.

ENTER: /s/ PHILIP ROMITI
/s/ MEL R. JIGANTI
/s/ DAVID LINN